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Supreme Court, U.S.
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No. 98-___

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In The

Supreme Court of the United States

DAVID F. LAROCHE,

Petitioner,

v.

GEORGE VOSE AND JEFFREY PINE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

What is the appropriate standard of review in a habeas corpus proceeding challenging a state court conviction on the basis that the defendant did not have adequate notice that his conduct was criminal, including the question of how that standard is informed by the fact that the State Court did not explicitly address the issue which is the basis for the habeas corpus petition, though there is no dispute that the issue was preserved in the state court system?

Was the defendant convicted in State Court without adequate notice that his conduct was criminal in violation of his right to due process of law?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David LaRoche respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The Court of Appeals entered a judgment denying a certificate of appealability. App. at 1. The District Court entered a judgment denying the petition for a writ of habeas corpus. App. at 7.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1999. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. section 2254(d) states as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application

> of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

2. United States Constitution – Fourteenth Amendment

CITIZENSHIP – Privileges and immunities – Due process – Equal protection of laws.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents an issue of fundamental importance with respect to the adjudication of habeas corpus petitions. 28 U.S.C. section 2254 provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

The first question this case presents is what provision of the above cited statute should apply and more particularly should the "contrary to" language or the "unreasonable application" language apply. The second question this case presents is whether or not the petitioner was convicted in State Court without adequate notice that his conduct was criminal in violation of his right to due process.

In this case the petitioner alleged that he was denied due process of law by virtue of having been convicted without adequate notice that the activity in which he was engaged was criminal. The petitioner was convicted of obtaining money under false pretenses based on a unique interpretation of the state statute on the subject. The issue was raised before the state Supreme Court, but the decision denying the appeal did not address the issue. There is no dispute that it was preserved. Both the District Court and the Court of Appeals held that the "unreasonable application" clause should govern, not the "contrary to" clause. This case presents an important question about the interpretation of 28 U.S.C. section 2254. This Court should resolve the issue of the appropriate standard to be applied. Related to this question is the second

question the petition presents. As to the substantive question, was the defendant convicted without adequate notice that his conduct was criminal.

FACTUAL BACKGROUND

The petitioner was a financial entrepreneur who was convicted of two counts of obtaining money under false pretenses and three counts of conspiring to do the same. There were three separate transactions which were the basis of the defendant's convictions. The defense argued throughout the proceedings that the statute under which the defendant was convicted did not give him notice that the financial activity in which was engaged was criminal. He was sentenced to a prison term on the two substantive counts, which term he is now serving.

The facts of the financial transactions which were the basis for the convictions were set forth in the opinion of the Rhode Island Supreme Court. The facts are reported verbatim from the Rhode Island Supreme Court. This case does not involve a dispute about facts, but about the legal consequences of established historical facts. The Rhode Island Supreme Court said:

> The first and second counts in the indictment alleged that in August 1988 LaRoche obtained, and conspired to obtain, $1.6 million from Davisville by false pretenses. Those counts concerned what was referred to by the parties in this appeal as "the Sherwood property" transaction. The state charged that LaRoche in early 1988 owed one of his business associates, David

Brodsky (Brodsky), more than one million dollars. In an attempt to satisfy at least part of that debt, LaRoche offered to sell Brodsky the Sherwood property, which was located in Portsmouth, Rhode Island, at a price well below its market value so that Brodsky could in turn resell the property at a profit. Brodsky did purchase this property, after obtaining a $1.4 million loan from Davisville. Brodsky encountered problems in reselling the Sherwood property, and LaRoche eventually offered to repurchase the real estate from him.

LaRoche, however, could not personally borrow the necessary $1.4 million from Davisville in order to repurchase the Sherwood property because the credit union had established monetary limits above which it could not lend to any one individual. This figure, referred to as a "lending limit," was later explained during the trial by an expert witness testifying for the state. (FN5) The expert testified that a lending institution calculated its lending limit by first discerning its net worth and then deciding upon a percentage of that net worth that it would then permit a single individual to borrow. In the case of Davisville, the board of directors had decided that it would permit a single borrower to take out a loan of up to 20 percent of the institution's net worth. (FN6) At the time LaRoche sought money to repurchase the Sherwood property, the lending limit at Davisville was about $1.9 million, and LaRoche's outstanding loans with the credit union amounted to about $1.6 million, which, of course, meant that LaRoche could not personally apply for a loan of $1.4 million to repurchase the Sherwood property from Brodsky. As a result, the state

alleged, LaRoche then decided to utilize a "straw borrower" in order to obtain the desired loan, and he offered a friend, P. Alan Ryan (Ryan), $50,000 if he would take out a loan from Davisville for the amount needed to repurchase the Sherwood property. LaRoche discussed that proposed loan with the branch manager at Davisville, Helen Arkwright (Arkwright), and Davisville vice president Wilfred McPeak (McPeak), who both agreed to LaRoche's plan and to permit LaRoche to use Ryan as the named loan applicant. Arkwright and McPeak at that time were loan committee members and recommended the loan's approval to the rest of the loan committee. However, no members of the credit union's board of directors, or any other members of the loan committee were ever apprised of the true nature of the method by which the loan transaction was structured. Consequently, Ryan, whose salary at the time was under $40,000, was able to take out a $1.4 million loan from Davisville.

. . .

The indictment's fifth and sixth counts charged LaRoche with obtaining, and conspiring to obtain, $800,000 from Davisville in June 1988 by false pretenses. Those counts alleged that LaRoche had earlier requested Dutra to apply for a loan from Davisville in his own name, and then Dutra ostensibly would use the loan proceeds to purchase from LaRoche "Tower Hill," a piece of property that LaRoche owned in North Kingstown, Rhode Island. The state alleged that the Tower Hill loan transaction was also conducted with the knowledge of certain Davisville officials, those being Arkwright, McPeak, and

Davisville president Edward Washburn. However, as was the case involving the Sherwood property deal, no members of Davisville's board of directors or any other members of the credit union's loan committee were ever informed of the true nature of the Tower Hill transaction. Dutra, as the straw borrower, did obtain the needed $800,000 by signing the required promissory note for the loan. Dutra, having been granted immunity, testified at LaRoche's trial. He testified that he never intended to repay the loan money himself because he had been assured by LaRoche that LaRoche would repay the loan. Dutra further testified that LaRoche had asked him to sign for the loan because LaRoche had reached his lending limit at Davisville.

The final count in the indictment, count 8, charged LaRoche with conspiring to obtain $1,920,000 from RICCU in December 1988 by false pretenses. (FN7) The basis of this charge was, again, LaRoche's use of a straw borrower, this time his utilization of the brother of P. Alan Ryan, one David Ryan, to apply for a loan with RICCU so that LaRoche could obtain the loaned money by then selling David Ryan a trailer park owned by LaRoche in Richmond, Rhode Island. This we shall refer to as the "Richmond trailer park" transaction. The state charged that the president of RICCU, John Lanfredi (Lanfredi), suggested to LaRoche that he utilize David Ryan to take out the loan because LaRoche was too close to his lending limit at RICCU and that a loan in LaRoche's name could not be approved. The $1,920,000 loan was eventually approved by RICCU's loan committee, however, once again

> without being informed of the true circumstances surrounding the transaction. David Ryan in fact testified at the trial that he never had any personal interest in owning the Richmond trailer park property, but had taken out the $1,920,000 loan "to help Mr. LaRoche." [Footnotes omitted]

State v. LaRoche, 683 A.2d 989, 993-994 (R.I. 1996).

Lower Court Proceedings

This case was tried to a jury in the Rhode Island Superior Court. The defendant was convicted on five of seven counts and acquitted of two counts. He filed an appeal from his conviction to the Rhode Island Supreme Court, there being no intermediate appellate court in Rhode Island. The Rhode Island Supreme Court denied the appeal in a reported decision, *State v. LaRoche*, 683 A.2d 989 (R.I. 1996).

The defendant filed a timely petition for a writ of habeas corpus in the United States District Court for the District of Rhode Island. The case was heard by a Judge from the United States District Court of New Hampshire, all of the federal judges in Rhode Island recusing themselves for sundry reasons. The District Court rendered an opinion on June 23, 1998, denying the petition for a writ of habeas corpus in an order and opinion. App. 7-22. A judgment was entered and an appeal was taken from the judgment. The District Court thereafter denied the petitioner's request for a certificate of appealability in a handwritten order on the face of the motion. The defendant thereafter moved for a certificate of appealability from the Court of Appeals, which denied the request in a

judgment. App. 1-6. The petitioner files this petition for a writ of certiorari to review the denial of a certificate of appealability by the Court of Appeals.

Throughout the habeas corpus proceedings, the petitioner has alleged " . . . a single due process claim – contending that the false pretenses statute provided him with inadequate notice that his actions were unlawful." App. 2. Though the State Supreme Court did not address this issue, the District Court concluded that it had been preserved. App. at 11.

The Court of Appeals held that:

> The "touchstone" of the due process inquiry is "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States* v. *Lanier*, 520 U.S. 259, 267 (1997); *accord*, e.g., *United States* v. *Bohai Trading Co.* , 45 F.3d 577, 580 (1st. Cir. 1995). The statute in question provides in relevant part as follows:
>
> > Every person who shall obtain from another designedly, by any false pretense or pretenses, any money, goods, wares, or other property, with intent to cheat or defraud . . . shall be deemed guilty of larceny.
>
> R.I. Gen. Laws § 11-41-4. Petitioner does not rest his argument on the statutory language per se. Instead, he complains that the provision has never before been applied to a situation comparable to the one here. And he points to various features of the case that allegedly buttress his claim – such as that the lending limits were self-imposed rather than legally mandated, and that

> each loan transaction was approved by credit union personnel. Under all the circumstances, he insists that he could not reasonably have anticipated that his use of nominee loans would violate the law.
> We disagree

App. 2-3.

The Court of Appeals then went on to state:

> While petitioner is correct that the state statute had never before been applied in this specific context, a cursory review of the law from other jurisdictions dispels any notion that this conduct could have been thought benign.

App. 3. The Court of Appeals then goes on to cite a number of authorities. Every single case cited by the Court of Appeals was a federal case involving prosecution under a federal statute. The Court of Appeals did not cite to a single opinion interpreting a state statute and cited only one secondary authority that dealt generally with banking crimes.

In rendering its decision the Court of Appeals also referenced the opinion of the District Court. The District Court said:

> To be sure, the petitioner argues that his conduct differs from other Rhode Island false pretense cases because it does not involve a "lie" and, in a related contention, he claims the statute has never been extended to reach behavior such as the "structuring" in which he was engaged. However, the term "false pretense" is reasonably clear, and a reasonable person would understand that the presentation to the credit

> unions of a straw borrower to enable the petitioner to obtain a loan for which he could not otherwise gain approval if he applied for it directly is a false pretense, if not a "lie". *See State v. Aurgemma*, 358 A. 2d 46, 50 (R.I. 1976) (misrepresentation of an existing fact is a "false pretense"). Further, the fact that the petitioner concocted a scheme creative enough so that no one before him had been punished for it under the false pretense statute does not immunize him from criminal liability. The statutory text reached his acts and did so with enough specificity to provide adequate notice that the petitioner's conduct was proscribed irrespective of how he chose to characterize that conduct.

App. 20.

The District Court also noted of the defendant that:

> He testified at trial that he did not believe that he had done anything wrong. The trial court stated its opinion at sentencing that it believed the petitioner on this point.

App. 10.

These facts set the context in which this case presents itself to this court. The defendant was convicted under a statute for a set of facts which had never before resulted in a conviction under that statute. The defendant testified at trial that he did not believe he was doing anything wrong and the sentencing court said it believed him. The defense argued that it was not on notice that the defendant's conduct was criminal. On its face this claim has a certain element of credibility strictly by virtue of the fact that the sentencing court opined that it believed the defendant when he testified that he did not think he was

doing anything wrong. If he were on notice that his conduct was criminal, he obviously could not believe that he was not doing anything wrong.

REASONS FOR GRANTING THE WRIT

There are two reasons to grant the petition for a writ of certiorari in this case. First, the issues presented in this case are of great importance in the administration of the writ of habeas corpus. Second, the decision of the State Court in this case was contrary to federal law.

I. THE STANDARD OF REVIEW

In this case the State Supreme Court did not explicitly address the issue which is the basis of the habeas corpus petition. The Court of Appeals opined:

> As a threshold matter, we reject petitioner's contention that the "contrary to" clause of 28 U.S.C. section 2254(d)(1), as opposed to the "unreasonable application" clause should govern here. He has made no showing that "Supreme Court precedent requires an outcome contrary to that reached by the . . . state court." *O'Brien v. DuBois*, 145 F.3d 16, 24-25 (1st Cir. 1998). Nor do we think a different standard is called for by the fact that the state court did not explicitly address the due process issue. Having reviewed the appellate briefs, we agree with the District Judge that the state court necessarily "rejected the merits of that argument" *sub silentio*. Decis. at 8. Accordingly, to obtain habeas relief petitioner must show that the state court's

> decision was "outside the universe of plausible, credible outcomes." *Id.* at 25; accord *Bui* v. *DiPaolo*, ___ F.3d ___, 1999 WL 126786, at 10 (1st Cir. Mar. 15, 1999).

App. 3.

The Court of Appeals held that the defendant had to show that the state court decision "was outside the universe of plausible, credible outcomes." Yet the State Supreme Court did not explicitly address this issue. There is no basis upon which to determine the rationale for the state court decision. There is no explicit or implicit explanation in the decision. The petitioner submits that the absence of any explanation at all for the basis of the decision precludes review based on the "unreasonable application" clause. In *Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir. 1988), *cert. denied*, 119 S.Ct. 587 (1998), the Court of Appeals said:

> Of course, because the state court decision fails to articulate any rationale for its adverse determination of Cardwell's claim, we cannot review that court's "application of clearly established Federal law," but must independently ascertain whether the record reveals a violation of Cardwell's Sixth Amendment right to the effective assistance of counsel. With only one minor change, we adopt the approach taken by the district court, which stated:
>
> > Where, as here, there is no indication of how the state court applied federal law to the facts of a case, a federal court must necessarily perform its own review of the record. . . . Thus, on the facts of this case, the distinction between de novo review and

> "reasonableness" review becomes [in]significant.
>
> *Cardwell*, 971 F. Supp. at 1015.

Cardwell v. Greene, 152 F.3d at 339. A silent decision may not be construed as "an unreasonable application of clearly established federal law." There has been no application at all of federal law. Rather, the inquiry must be whether or not the decision is contrary to federal law.

The petition for certiorari should be granted to define the appropriate standard of review in a case in which the state court decides a constitutional claim without comment or opinion.

II. THE SUBSTANTIVE CLAIM

This Court has said that, " 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' " *United States v. Lanier*, ___ U.S. ___, 117 S.Ct. 1219, 1224-25, 137 L.Ed.2d 432,(1995), quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351, 84 S.Ct. 1697, 1701, 12 L.Ed.2d 894 (1964), quoting *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 811-812, 98 L.Ed. 989 (1954).

The critical question in this case is whether or not the defendant was on notice that his conduct was criminal. The historical facts as to what his conduct was are not in dispute. There was nothing inherently illegal in the activities in which the petitioner engaged. They were business transactions. He did not lie in documents presented to financial institutions. None of the typical indicia of a so-called false pretenses conviction exist. This is not a case

about lying or paying off insiders in a bank, or anything similar. These were business transactions that went bad and with 20/20 hindsight were declared to be criminal.

The three transactions which are the basis of petitioner's conviction share certain characteristics which are significant. Each transaction involved a refinancing. The new financing was by the same institution that had the old financing. In other words, the institution was not incurring a new loan, but refinancing an old loan. The defendant makes this point to blunt the superficial impression implicit in a charge of obtaining money under false pretenses through large loans. The transactions did not result in either credit union disbursing new money to anyone, with the exception of $44,164 in net proceeds to petitioner as a result of one transaction. Rather the proceeds of the loans were used to pay off existing debt. This is important because it further illuminates why petitioner would not be on notice that the activity in this case was illegal. Even if one accepts the theory that these transactions involved straw borrowing by petitioner, they were refinancings. The lending institutions had their own self-interest in the consummation of these transactions.

Second, underlying the analysis of these transactions is a sense that the petitioner controlled the amount he had borrowed from the lending institution. This is obviously false in that no institution can be made to loan money. It was always the decision of each credit union as to whether or not to loan money to petitioner. It was also the decision of each lending institution as to how much money was loaned to petitioner at any given time by use of the device of participation loans.

Participation loans are loans in which a lending institution loans money to a person, but then sells a portion of that loan to one or more other lending institutions. In this case, for example, there was clear evidence that on the day after the 1.92 million dollar transaction which was the basis of Count 7, Rhode Island Central Credit Union loaned petitioner 6.8 million dollars. It then sold portions of that loan to two other credit unions, one of which happened to be the other credit union involved in this case. The borrower has no knowledge of this action by the lender and no control over it. The decision about whether or not to participate out a loan rests with the lender. Obviously, with respect to the issue of lending limits, if the bank could have sold all or a portion of its loan consistent with its policies and failed to do so, that has nothing to do with petitioner. Petitioner had the right to assume the bank would abide by its own policies. Clearly, the credit union could have sold all or some of either the 1.92 of 6.8 million dollar loans without petitioner even knowing it. Obviously, with respect to the issue of lending limits, the decision is critical both with respect to a borrower's lending limits at the lending institution that originated the loan and with respect to the borrower's lending limits at any other financial institutions that participate in the loan with the initial lending institution.

In every instance, the transactions were approved by either the President or Vice-President of the lending institution and every detail of every transaction was fully disclosed to the bank officers. There is not a single fact that was not fully disclosed.

The state's primary position and the beginning point of its logic has been that the bank's internal policy regarding loan limits would have precluded new loans to the defendant. The state does not dispute that the buyer's loans as to them were within the policy limits, but argues that these sales represent a way for the defendant to avoid the impact of lending limits. The state also admits that violating lending limits is not itself a crime but maintains that structuring around lending limits is the crime of obtaining money under false pretenses. The logical corollary of the state's argument is that a direct loan over the lending limits is not a crime but a loan itself under the lending limits is a crime because its purpose was to structure a result which enabled the defendant not to transact loans above the lending limits and because the defendant no longer needed to borrow money himself and consequently avoid the impact of the policy.

A good part of the trial consisted of a parade of directors from the two credit unions who testified that lending limits were set by shareholder votes at each annual meeting. The concept was that the defendant could not rely on the apparent authority of even the President of the bank when structuring a refinancing that could be construed as going around the lending limits. Consequently, the state argued that the admitted complete disclosure by the defendant was not enough because the bank officers and the defendant were equally guilty of a false pretense by failing to notify the depositors or shareholders. The petitioner respectfully submits that nobody in the commercial field is on notice that in securing lending they must give notice not only to the

appropriate bank officers, but also to the lending institution's depositors and shareholders.

The loans in this case remained performing loans for a considerable period of time. Each loan was backed by collateral. The lending institutions were making money on loans secured by more than adequate collateral at the time of the making of the loans. Only the deep real estate recession with the resulting destruction of the underlying value of the collateral caused the lending institutions in this case to lose money.

The Court of Appeals acknowledged that the state statute had never previously been applied in the specific context of the facts of this case, but said that analogous cases from other jurisdictions had been found to be violative of federal statutes. App. 3. The Court of Appeals went on to cite a number of cases for certain general propositions.

The Court noted that third party beneficiaries of nominee loans have been held criminally liable. There is no dispute with his fundamental principle. The petitioner disputes that the transactions in this case constituted nominee loans. In each case the loan was secured by collateral. The petitioner also notes that not every use of a nominee borrower is a crime. The cases identified by the Court of Appeals present fact patterns that are very different from the fact pattern in this case. The Court cited *United States v. Brennan*, 994 F.2d 918, 921 (1st Cir. 1993). Yet in that case the Court found that the bank official did not bring loans to the attention of either the bank investment board or the bank president and that affirmative steps were taken to conceal from others at the bank the

problems of the borrower. That is not what happened in this case. In this case, in the case of each loan a senior bank official was aware of the loan. There was no attempt to conceal matters from others at the bank. Moreover, the loans in this case, as previously noted, were all fully collateralized. *United States v. Cyr*, 712 F.2d 729 (1st Cir. 1983), another case cited by the Court of Appeals, involved a fact pattern laden with false statements in loan applications. No such similar activity took place in this case.

The Court noted that schemes to circumvent lending limits have been proscribed. The Court cited *United States v. Crabtree*, 979 F.2d 1261 (7th Cir. 1992) for this proposition. Yet, *United States v. Crabtree* is very different than this case. There was no evidence of sales of property or the receipt of collateralized loans. Moreover, in that case, the bank was not informed of the true purpose of the loans. *United States v. Crabtree*, 979 F.2d at 1264. In this case, in every instance the lending institution knew the purpose of the proceeds of the transactions. *United States v. Castiglia*, 894 F.2d 533 (2nd Cir. 1990), another case cited by the Court of Appeals for the lending limits proposition, involves a bank officer's self dealing. That is very different than this case. Certainly, the petitioner in this case was never an officer of any lending institution from which he obtained money.

The Court of Appeals noted that 18 U.S.C. section 1344 was similar to the Rhode Island false pretenses statute because it barred any scheme to obtain money from a financial institution by means of a false pretense. The Court cited *Feingold v. United States*, 49 F.3d 437 (8th Cir. 1995) for this proposition. In the *Feingold* case, there

were false entries. In this case there were not false entries. In the *Feingold* case, there was an effort to conceal the nature of the transactions from the bank loan committee. In this case, every aspect of each transaction was spelled out in great detail. What transpired was the opposite of concealment. *United States v. Hammen*, 977 F.2d 379 (7th Cir. 1992), another cited case, involved a situation in which a bank official who was approving loans and processing loans withheld information from the loan committee and or the bank president. *United States v. Hammen*, 977 F.2d at 382. The scheme also involved false financial statements. *United States v. Hammen*, 977 F.2d at 381. Both of these factors are different than what happened in this case, in which the bank knew what was transpiring and there were not false entries made in financial statements.

The Court of Appeals noted that federal law forbids a situation in which a putative borrower lacks the financial ability to repay a loan or has been assured they will not be required to repay a loan. App. 4. The Court then cited *United States v. Wester*, 90 F.3d 592 (1st Cir. 1996) and *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974). The Court said that though these were federal cases, they put the defendant on notice that the kind of activity in which he engaged was forbidden. The Wester case involved classic self dealing by a president, chief executive officer, and chairman of the board of a bank. *United States v. Wester*, 90 F.3d at 593. In this case, there is not one bit of evidence which points in the direction of self-dealing by the bank officials. The defendant was not ever a bank official. In addition, the information provided to the loan committee was not truthful. *United States v. Wester*, 90 F.3d at 594. Again, this is very different than the situation

in the instant case, where there were no false statements and no withholding of information from the lending institutions. *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974) involved very straightforward loans to people who made the proceeds available to a third party. Unlike the situation in this case, there was no transfer of property and no collateral, upon which a loan was based.

In this case the defendant was a businessman. He participated in certain commercial transactions with lending institutions and others. Nothing was ever concealed. No lie was told to anyone. The records reflect accurate information. No lending institution official ever received anything for their participation in any of the disputed transactions. At the time of the making of each loan, there was adequate collateral. The defendant did not believe his conduct was criminal and the sentencing judge believed the defendant on this point. The defendant submits that when all of the factors are considered, his state court conviction denied him due process of law and the certificate of appealability should have been granted.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 98-1883

DAVID F. LAROCHE,

Petitioner,

v.

GEORGE VOSE AND JEFFREY PINE,

Respondents.

Lynch, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and Lipez, *Circuit Judge*.

JUDGMENT

Entered: March 31, 1999

Petitioner David LaRoche seeks a certificate of appealability (COA) in order to appeal from the denial of his petition under 28 U.S.C. § 2254 for habeas relief. A once-prominent Rhode Island real estate developer, petitioner was found to have used "nominee" or "straw" borrowers back in 1988 in order to obtain three loans from a pair of credit unions – loans he was unable to acquire on his own behalf because of internal lending limits. Such conduct resulted in his conviction on charges of obtaining money by false pretenses and conspiring to do so, in violation of state law. After his convictions were affirmed on direct appeal, *see State v. LaRoche*, 683 A.2d 989 (1996), petitioner filed this request for habeas relief.

He there advanced a single due process claim – contending that the false-pretenses statute provided him with inadequate notice that his actions were unlawful. The district court rejected this claim in a comprehensive decision and thereafter denied a COA.

Petitioner can obtain a COA only by making a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Having reviewed the record in detail, we find that no such showing has been made. The application for a COA will thus be denied, substantially for the reasons stated by the district court. We add only the following comments.

The "touchstone" of the due process inquiry is "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997); *accord, e.g., United States v. Bohai Trading Co.*, 45 F.3d 577, 580 (1st Cir. 1995). The statute in question provides in relevant part as follows:

> Every person who shall obtain from another designedly, by any false pretense or pretenses, any money, goods, wares, or other property, with intent to cheat or defraud . . . shall be deemed guilty of larceny.

R.I. Gen. Laws § 11-41-4. Petitioner does not rest his argument on the statutory language per se. Instead, he complains that the provision has never before been applied to a situation comparable to the one here. And he points to various features of the case that allegedly buttress his claim – such as that the lending limits were self-imposed rather than legally mandated, and that each loan

transaction was approved by credit union personnel. Under all the circumstances, he insists that he could not reasonably have anticipated that his use of nominee loans would violate the law. We disagree.

As a threshold matter, we reject petitioner's contention that the "contrary to" clause of 28 U.S.C. § 2254(d)(1), as opposed to the "unreasonable application" clause, should govern here. He has made no showing that "Supreme Court precedent requires an outcome contrary to that reached by the . . . state court." *O'Brien v. DuBois*, 145 F.3d 16, 24-25 (1st Cir. 1998). Nor do we think a different standard is called for by the fact that the state court did not explicitly address the due process issue. Having reviewed the appellate briefs, we agree with the district judge that the state court necessarily "rejected the merits of that argument" *sub silentio*. Decis. at 8. Accordingly, to obtain habeas relief petitioner must show that the state court's decision was "outside the universe of plausible, credible outcomes." *Id.* at 25; *accord Bui v. DiPaolo*, ___ F.3d ___, 1999 WL 126786, at *10 (1st Cir. Mar. 15, 1999).

While petitioner is correct that the state statute had never before been applied in this specific context, a cursory review of the law from other jurisdictions dispels any notion that his conduct could have been thought benign. For example, on numerous occasions (both before and after the evens in question here), federal courts have found analogous nominee-loan schemes to be violative of one or more statutory provisions. *See generally* 1 John Villa, *Banking Crimes* § 3.05 (1998) (discussing crimes involving "nominee borrowers"). Rather than describe

this case law at any length (or highlight the factual variations from one case to another), we simply note the following. Third-party beneficiaries of such loans (the status occupied by petitioner here) have often been subject to prosecution. *See, e.g., United States v. Brennan*, 994 F.2d 918, 921 (1st Cir. 1993); *United States v. Cyr*, 712 F.2d 729, 733 (1st Cir. 1983). Schemes designed to circumvent a bank's lending limits (whether self-imposed or otherwise) have been proscribed. *See, e.g., United States v. Crabtree*, 979 F.2d 1261, 1263 (7th Cir. 1992); *United States v. Castiglia*, 894 F.2d 533, 534 (2d Cir. 1990). And one of the statutes applied in this context – the bank-fraud provision in 18 U.S.C. § 1344 – is not unlike the Rhode Island enactment in that it, *inter alia*, bars any scheme to obtain money from a financial institution by means of "false pretenses." *See, e.g., Feingold v. United States*, 49 F.3d 437, 439-40 (8th Cir. 1995); *United States v. Hammen*, 977 F.2d 379, 383-84 (7th Cir. 1992).

More particularly, we note that federal law prohibits the use of a nominee loan where the putative borrower either (1) lacks the financial capacity to repay the loan or (2) has been assured that he or she would not be responsible for doing so. *See, e.g., United States v. Wester*, 90 F.3d 592, 596-97 (1st Cir. 1996); *United States v. Gens*, 493 F.2d 216, 221-23 (1st Cir. 1974). Under these criteria, all three of the transactions here would be unlawful. Two of the nominee borrowers (Bernard Dutra and Alan Ryan) had neither the wherewithal to make the loan payments nor any intention of doing so. And the third (David Ryan), while apparently having ample resources at his disposal, had been assured that others would be responsible for

repayment.[1] Of course, petitioner was not convicted under federal law. Yet this parallel line of authority undermines the claim that he could not reasonably have anticipated that his conduct was forbidden.

Petitioner's remaining contentions are likewise unavailing. As mentioned, he emphasizes that the credit union lending limits were not mandated by state law. Yet this fact is unimportant; petitioner was not convicted of violating the lending limits. The key point is that he was unable to obtain further loans on his own behalf. The reason for his inability to do so is of scant relevance. *Cf. Hammen*, 977 F.2d at 380, 384 (upholding conviction for nominee-loan scheme designed to provide funds to third party who had been "barred . . . from conducting any business at the bank" because of prior defaults).

Petitioner also maintains that he disclosed all details of the loan arrangements to the credit union management, that whether the loans were approved was a managerial decision, and that whether the lending limits were observed in the process was not his concern. Yet as petitioner was aware, the pertinent details were revealed only to those officials collaborating in the scheme and were purposely withheld from others. And as the district court noted, it is no defense that "others knew of, approved of, or even assisted in" the commission of a crime. Decis. at 17.

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[1] An occasional suggestion to the contrary voiced by petitioner – to the effect that his dealings with the nominee borrowers were all conducted at "arm's length" – is belied by the record.

Finally, petitioner insists that the transactions did not involve any explicit falsehoods and were not "inherently" wrong. The district court convincingly rebutted this contention by observing the following: that "a reasonable person would understand that the presentation to the credit unions of a straw borrower to enable the petitioner to obtain a loan for which he could not otherwise gain approval if he applied for it directly is a false pretense, if not a 'lie.' " *Id.* at 15. We think a reasonable person would also understand that such a scheme has a "natural tendency to injury or defraud" the financial institution, *Gens*, 493 F.2d at 222, and so is inherently improper. *See, e.g., United States v. Willis*, 997 F.2d 407, 410 n.2 (8th Cir. 1993) ("Nominee loans are not illegal per se. They are illegal, however, when the borrower and the bank officer fail to state the real borrower and recipient of the funds, thereby obtaining the loans by means of false pretenses."); *Cyr*, 712 F.2d at 734 (holding that "scheme of using nominee borrowers to obtain money from a bank for use by one who cannot herself arrange for a formal loan" was unlawful).

The application for a certificate of appealability is denied, and the appeal is terminated.

By the Court:

PHOEBE MORSE

Clerk.

[Cert. Copy to Honorable Joseph A. DiClerico and David DiMarzio, Clerk United States district Court for the District of Rhode Island]

[cc: Messrs. Mann, Weisman and Ms. McSoley]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

David F. Laroche

v.

George Vose

Civil No. 97-409-JD

ORDER

(Filed Jun. 23, 1998)

On July 21, 1997, the petitioner, David F. LaRoche, brought this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 against the respondent, George Vose, the Attorney General of the state of Rhode Island. The gravamen of the petitioner's claim is that his conviction violated his due process rights because he was convicted for engaging in conduct that he lacked clear notice was criminal. Before the court is the petitioner's request for a writ of habeas corpus (document no. 1).

Background[1]

The petitioner is an entrepreneur who "fell prey . . . to the devastating financial upheavals created by

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[1] The court summarizes the relevant background information. A more detailed factual recitation is set forth in the opinion of the Supreme Court of Rhode Island denying the petitioner's direct appeal. *See State v. LaRoche*, 683 A.2d 989 (R.I. 1996). Because the petitioner has presented only a legal challenge as to his conviction, the court accepts the facts relating to the petitioner's conviction as set forth in that opinion. *See* 28 U.S.C.A. § 2254(e)(1) (West Supp. 1998) (presumption of correctness of factual determinations made by state court); *see also infra* note 4.

the October 1987 stock market crash." *State v. LaRoche*, 683 A.2d 989, 991-92 (R.I. 1996). In an effort to keep his foundering financial affairs afloat, he used straw borrowers to obtain loans from credit unions that he was unable to obtain in his own name because of the institutions' lending limits.[2] As a result, he was convicted on two counts of obtaining money by false pretenses and three counts of conspiring to obtain money by false pretenses on July 6, 1993. The Rhode Island false pretenses statute provides, in relevant part, the following:

> Every person who shall obtain from another designedly, by any false pretense or pretenses, any money, goods, wares, or other property, with intent to cheat or defraud . . . shall be deemed guilty of larceny.

R.I. Gen. Laws § 11-41-4 (1956).

The petitioner was convicted on charges stemming from three different transactions, all involving the same modus operandi, directed at two different financial institutions, the Davisville Credit Union ("Davisville") and the Rhode Island Central Credit Union ("RICCU"). The first transaction, known as the "Sherwood property" transaction, resulted in the petitioner's conviction on one count of obtaining by false pretenses, and one count of conspiring to obtain by false pretenses, a $1.4 million loan from Davisville in August 1988. The petitioner wanted to

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[2] The lending limits, which at the time represented the internal policies of the credit unions and since have been statutorily enacted, cap the amount that any individual can borrow at a fixed percentage of the credit union's net worth. The lending limits were established by the institutions' boards of directors.

repurchase the Sherwood property, which he had previously sold to a business associate to whom he owed money on the assumption that it would increase in value. When it did not, he agreed to buy it back but needed to take out a loan to do so.

First, however, the loan had to be approved by the loan committee. At the time, the lending limit at Davisville, as set by the board of directors, was approximately $1.9 million and the petitioner had already borrowed about $1.6 million. Under those circumstances, the loan committee would not approve the loan. To circumvent this obstacle, he offered to give a friend, P. Alan Ryan, $50,000 if Ryan would take out the loan from Davisville to cover the amount necessary. The petitioner discussed his plan with a branch manager and a vice president at Davisville, each of whom approved of it. The two were on the Davisville loan committee and recommended the loan to the committee but failed to disclose to the rest of the loan committee or the board of directors the true nature of the transaction. The loan committee approved Ryan's application, Ryan obtained the loan, and the petitioner obtained the benefit of the funds.

The second transaction, known as the "Tower Hill" transaction, resulted in the petitioner's conviction on one count of obtaining by false pretenses, and one count of conspiring to obtain by false pretenses, an $800,000 loan from Davisville in June 1988. Bernard Roy Dutra, a friend of the petitioner, obtained the loan at the petitioner's request to purchase Tower Hill from the petitioner. Dutra granted the petitioner an option to buy the property back at the same price and never intended to repay the loan himself. The true nature of this transaction was known

not only to the two Davisville officers who were aware of the Sherwood property transaction but also to Davisville's president. Again, each of the three credit union officials with knowledge of the true nature of the transaction failed to inform the other members of the loan committee or the board of directors and the loan was approved.

The third transaction, known as the "Richmond trailer park" transaction, resulted in the petitioner's conviction on one count of conspiring to obtain by false pretenses a $1.92 million loan from RICCU in December 1988. For this loan, RICCU's president recommended that the petitioner use a straw borrower to obtain the loan because the petitioner was too close to his lending limit at RICCU and the loan could not be approved in his name. The petitioner had David Ryan, the brother of P. Alan Ryan, apply for the loan. The petitioner obtained the proceeds by "selling" the Richmond trailer park to Ryan. Again, the loan committee was not informed of the true nature of the transaction. Ryan testified at trial that he had no personal interest in owning the Richmond trailer park and took out the loan "to help" the petitioner. *LaRoche*, 683 A.2d at 994.

The three transactions had the effect of refinancing the properties in question and allowed the petitioner temporarily to shore up his collapsing financial position. As the value of his assets deteriorated, however, he was ultimately unable to service the loans. He testified at trial that he did not believe that he had done anything wrong. The trial court stated its opinion at sentencing that it believed the petitioner on this point. However, it allowed his conviction to stand because it found that the evidence,

taken in the light most favorable to the conviction, was sufficient to allow the jury to conclude beyond a reasonable doubt that the petitioner had obtained the loans by false pretenses with the intent to defraud. *See id.* at 995-96.

Subsequent to his conviction, the petitioner appealed to the Supreme Court of Rhode Island. *See id.* at 991.[3] One of several arguments presented by the petitioner in his appeal was that his conviction violated due process because he lacked notice that his conduct was criminal. However, the court did not address that argument in resolving his appeal. *See LaRoche*, 683 A.2d at 991-1001. Despite the court's failure to address this argument, the petitioner's presentation of the argument to the court satisfied the requirement that he exhaust his state court remedies before seeking habeas relief. *See, e.g., Nadworny v. Fair*, 872 F.2d 1093, 1097 (1st Cir. 1989).

Discussion

The enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1217 (1996), on April 24, 1996, significantly altered the prior framework governing habeas corpus petitions. The AEDPA amendments apply to this petition filed on July 23, 1997. The relevant amended version of 28 U.S.C. § 2254 provides as follows:

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[3] The petitioner also sought post conviction relief from the trial court on the basis of newly disclosed facts. The trial court denied the motion on May 22, 1997. The petitioner did not appeal this decision.

> (a) [A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
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> . . . .
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> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

28 U.S.C.A. § 2254 (West 1994 & Supp. 1998).

At the time this petition was filed, the First Circuit had not addressed the question of how the new § 2254(d)(1) standard of review was to be applied. On May 26, 1998, however, the First Circuit declared its interpretation of the standard in *O'Brien v. DuBois*. *See* ___ F.3d ___, No. 97-1979, 1998 WL 257206 (1st Cir. May 26, 1998). As the *O'Brien* court held, pursuant to AEDPA:

> A federal habeas court charged to weigh a state court decision must undertake an independent two-step analysis of that decision. First, the habeas court asks whether the [United States] Supreme Court has prescribed a rule that governs the petitioner's claim. If so, the habeas court gauges whether the state court decision is

> "contrary to" the governing rule. In the absence of a governing rule, the "contrary to" clause drops from the equation and the habeas court takes the second step. At this stage, the habeas court determines whether the state court's use of (or failure to use) existing law in deciding the petitioner's claim involved an "unreasonable application" of [United States] Supreme Court precedent.

Id. at *7. The First Circuit went on to note, as follows:

> [A]n affirmative answer to the first section 2254(d)(1) inquiry – whether the Supreme Court has prescribed a rule that governs the petitioner's claim – requires something more than a recognition that the Supreme Court has articulated a general standard that covers the claim. To obtain relief at this stage, a habeas petitioner must show that Supreme Court precedent requires an outcome contrary to that reached by the relevant state court.
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> We caution that this criterion should not be applied in too rigid a manner. A petitioner need not point a habeas court to a factually identical precedent.

Id. at *8 (citation omitted). It also provided:

> If no Supreme Court precedent is dispositive of a petitioner's claim, then, *a fortiori*, there is no specific rule to which the state court's decision can be "contrary." In such circumstances, a federal habeas court then determines whether the state court decision reflects an unreasonable application of clearly established Supreme Court jurisprudence. This reduces to a question of whether the state court's derivation of a case-specific rule from the Court's generally

> relevant jurisprudence appears objectively reasonable.

Id. at *9. This second standard is a higher one, because "for the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." *Id.*

One important question not answered by *O'Brien*, however, is how the court is to treat the failure of a state court to address an argument raised by the petitioner. In this case, the court holds that the structure presented by *O'Brien*, despite its failure to explicitly address this situation, is broad enough to encompass it. The mere failure of a state court to address an issue, particularly in the context of a direct appeal where numerous other issues are raised and addressed in detail, is not itself "so arbitrary[ ] as to indicate that [the decision not to address an argument] is outside the universe of plausible, credible outcomes." *Id.* Under the circumstances, the only reasonable interpretation of the Supreme Court of Rhode Island's failure to respond directly to the petitioner's due process argument is that it rejected the merits of that argument. To justify habeas relief, therefore, the issue raised by the petitioner must be subject to *O'Brien*'s two-step analysis to determine whether that court's implicit rejection of his argument justifies the grant of habeas relief under § 2254.

The petitioner has put forth a single legal argument in support of his petition. He contends that his conviction

violated his due process rights because he lacked adequate notice that his conduct was criminal.[4] In support of this argument, he asserts that he was doing nothing more than structuring transactions, which is not itself illegal. He contends that the lending limits were, at the time of his offenses, only the internal policies of the credit unions and that even the subsequent statutory enactment of them did not impose any burden or obligation on borrowers, but only on lenders. He claims that the fact that several credit union offices knew of, approved of, and in some cases even recommended that he proceed as he did militates against any inference that he had notice that his behavior was criminal. He also urges that the Rhode Island false pretenses statute had never before been applied to reach his allegedly illegal conduct.

To the extent that the petitioner argues that he personally lacked actual notice that the conduct for which he

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[4] The petitioner's argument, although presented as a due process challenge to the false pretenses statute, also appears to encompass an implicit assertion that the state adduced at trial insufficient evidence that the petitioner intended to defraud the credit unions to support his conviction. However, in addition to failing to make this argument explicitly, the petitioner has failed to come forward with the proper evidentiary support necessary to sustain such a claim. Both state courts made the factual determination that the trial testimony permitted the factual inference, beyond a reasonable doubt, that the petitioner's actions were motivated by an intent to defraud. *See* § 2254(e)(1) (West Supp. 1998) (determination of factual issues determined by state court presumed correct and petitioner bears burden of rebutting presumption of correctness by clear and convincing evidence). Therefore, only the petitioner's explicit legal argument warrants detailed analysis.

was convicted was illegal, the argument is wholly without merit. Cases cited by the petitioner himself acknowledge the principle that "ignorance of the law generally is no defense to a criminal charge." *E.g., Ratzlaf v. United States*, 510 U.S. 135, 149 (1994). In this context, the Due Process Clause requires nothing more than that a criminal statute be sufficiently clear to provide fair notice to a reasonable person of what conduct is proscribed. *See United States v. Lanier*, 520 U.S. 259, ___, 117 S. Ct. 1219, 1225 (1997). The pertinent legal issue raised by the petitioner, therefore, is not whether he knew his conduct was illegal but whether a reasonable person could have known that his conduct was criminal prior to his conviction. *See id.* at ___, 117 S. Ct. at 1225. The court accordingly examines the Supreme Court of Rhode Island's implicit determination that the Rhode Island false pretenses statute is sufficiently clear to provide a reasonable person with adequate notice that the conduct in which the petitioner engaged fell within the ambit of the statute.

The court first "asks whether the [United State] [sic] Supreme Court has prescribed a rule that governs the petitioner's claim." *O'Brien*, 1998 WL 257206, at *7. The Supreme Court of the United States has clearly embraced the principle that " ' "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." ' " *Lanier*, 520 U.S. at ___, 117 S. Ct. at 1225 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (itself quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954))). It is equally clear, however, that this proclamation is an instance of a "general standard" that, while it covers the petitioner's claim, cannot be said

to "require[] an outcome contrary to that reached by the relevant state court." *O'Brien*, 1998 WL 257206, at *8.

Nor do the Supreme Court cases cited by the petitioner provide a more specific principle that can fairly be said to compel a conclusion in the case at hand contrary to that reached by the state courts. *See Lanier*, 520 U.S. at ___, 117 S. Ct. at 1225; *Ratzlaf*, 510 U.S. at 148; *Marks v. United States*, 430 U.S. 188, 195 (1977); *Bouie*, 378 U.S. at 350-51. *Lanier* dealt with a state court judge convicted under the criminal civil rights statute for violating the constitutionally protected rights of five women by sexually assaulting them. *See* 520 U.S. at ___, 117 S. Ct. at 1222. The Sixth Circuit reversed his convictions, holding that because the constitutional right that he was accused of violating "had not been previously identified by [the United States Supreme Court] in a case with fundamentally similar facts," he lacked adequate notice that his conduct would violate the statute. *Id.* at ___, 117 S. Ct. at 1222. The Supreme Court reversed, holding that the Sixth Circuit had invoked too narrow a view of what was required to serve as proper notice that a right was constitutionally protected. *See id.* at ___, ___, 117 S. Ct. at 1224, 1227. The relevance to this case is limited, however, because it dealt specifically with the definition of constitutionally protected rights in the context of the federal criminal civil rights statute. *See id.* at ___, 117 S. Ct. at 1224.

Ratzlaf involved the quantum of intent required to support a conviction for "willfully violating" provisions of the antistructuring statute, 31 U.S.C. §§ 5322(a), 5324(3). *See* 510 U.S. at 137-38, 146-47. The Supreme Court held that the statutory text of the provision at issue

required that the defendant know that the structuring in which he was engaged was unlawful. *See id.* at 146-47. However, the Court expressly noted that this was a case in which Congress had provided by the terms of the offense a specific exception to the general rule that "ignorance of the law generally is no defense to a criminal charge." *Id.* at 149; *see also Aversa v. United States*, 99 F.3d 1200, 1205 n.4 (1st Cir. 1996) (noting that, after the *Ratzlaf* opinion, Congress amended 31 U.S.C. § 5324 to remove willfulness as an element of the offense).

In *Marks*, the defendants were convicted of violating the federal obscenity statute not under the more favorable interpretation of what constituted obscenity in force at the time they committed the acts with which they were charged, but under a more expansive interpretation of the obscenity statute adopted after their arrest. *See* 430 U.S. at 194. The obscenity statute "always has used sweeping language to describe that which is forbidden," making judicial interpretation essential to provide fair warning of what conduct is prohibited. *Id.* at 195. The Supreme Court overturned their convictions because the retroactive application of the expanded definition of obscenity to their conduct failed to provide adequate notice that the conduct violated the statute. *Id.* at 195, 197. The Court also noted that its opinion was influenced by the fact that the statute at issue regulated expression and implicated First Amendment values. *See id.* at 196.

Bouie involved a state criminal trespass statute that was clear on its face and whose plain meaning did not reach the conduct for which the defendants were convicted. *See* 378 U.S. at 356. The state's supreme court on appeal, however, upheld the convictions by adopting "an

unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 352. The Supreme Court reversed the convictions, holding that the retroactive application of such a reading of the statute failed to "give fair warning of the conduct that it makes a crime." *Id.* at 350, 363.

None of these cases requires an outcome contrary to that implicitly reached by the Supreme Court of Rhode Island when it determined that the petitioner was not entitled to have his conviction invalidated. *See O'Brien*, 1998 WL 257206, at *7. The petitioner's case does not involve, as did *Lanier*, a statute that criminalized the deprivation of rights defined outside the statute itself. Neither does it involve, as did *Ratzlaf*, a statute that has, as an element of the offense, a specific intent requirement so that a person accused of the crime must have knowledge that the conduct is illegal. Unlike *Marks* and *Bouie*, the petitioner's case presents neither a changed judicial interpretation of a vague statute or a novel judicial interpretation of a clear statute to reach a result contrary to the statute's text. Thus, neither the general principle espoused by these cases nor their specific holdings warrant habeas relief under the first part of the *O'Brien* inquiry. *See id.*

Therefore, the court considers the second question: whether the result reached by the Supreme Court of Rhode Island was an unreasonable application of existing Supreme Court precedent. *See O'Brien*, 1998 WL 257206, at *7. Conviction under a criminal statute violates the Due Process Clause if the statute is vague and the vagueness is not clarified by case law interpreting it, *see Marks*, 430 U.S. at 195, or if the statute is clear in the conduct that

it defines as criminal but it is applied by judicial interpretation to a factual situation beyond the definition existing at the time of the challenged conduct, *see Bouie*, 378 U.S. at 350. As noted by the Supreme Court of Rhode Island, the crime of obtaining money by false pretenses has two elements: (1) the petitioner designedly obtained money from another by a false pretense or pretenses; and (2) the petitioner did so with the intent to cheat or defraud. *See LaRoche*, 683 A.2d at 995.

None of the terms of the false pretenses statute are sufficiently vague, either on their face or in light of Rhode Island case law, to implicate due process notice concerns. To be sure, the petitioner argues that his conduct differs from other Rhode Island false pretense cases because it does not involve a "lie,", in a related contention, he claims that the statute has never been extended to reach behavior such as the "structuring" in which he was engaged. However, the term "false pretense" is reasonably clear, and a reasonable person would understand that the presentation to the credit unions of a straw borrower to enable the petitioner to obtain a loan for which he could not otherwise gain approval if he applied for it directly is a false pretense, if not a "lie." *See State v. Aurgemma*, 358 A.2d 46, 50 (R.I. 1976) (misrepresentation of existing fact is a "false pretense"). Further, the fact that the petitioner concocted a scheme creative enough so that no one before him had been punished for it under the false pretenses statute does not immunize him from criminal liability. The statutory text reached his acts and did so with enough specificity to provide adequate notice that the petitioner's conduct was proscribed irrespective of how he chose to characterize that conduct.

Thus, the petitioner's claim that he was doing nothing more than structuring transactions, which is not in itself illegal, is inapposite. The use of a false pretense to structure transactions meets the definition of the crime of obtaining money by false pretenses whether or not the false pretense can also be characterized as "structuring." Further, the fact that the lending limits represented only the internal policies of the credit unions and lacked the force of law is of no legal significance because of the evidence that the petitioner would not have qualified for the loans had he applied for them directly. The fact that certain bank officers knew that he was engaged in the endeavor, in one instance recommended this course of action, and in all three transactions helped him to execute his plan by presenting the sham to the relevant loan committees and recommending loan approval is also without legal significance. It is no defense to one's criminal activity to say that others knew of, approved of, or even assisted in its commission.

For these reasons, the court concludes that the Supreme Court of Rhode Island's failure to overturn the petitioner's conviction on the grounds that he lacked adequate notice that the conduct he engaged in was criminal was neither "contrary to, [nor] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d)(1). The false pretenses statute provided adequate notice that the conduct engaged in by the petitioner was prohibited and the state courts' refusal to overturn his conviction on this basis was proper. Accordingly, the petition for a writ of habeas corpus must be denied.

Conclusion

The petitioner's request for a writ of habeas corpus (document no. 1) is denied. The clerk is ordered to close the case.

SO ORDERED.

/s/ Joseph A. DiClerico, Jr.
Joseph A. DiClerico, Jr.
District Judge

June 23, 1998
cc: Robert B. Mann, Esquire
Lauren S. Zurier, Esquire
Clerk, USDC-RI